Supreme Court, U.S.
FILED

No. 961906 APR 9 1997

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In The

Supreme Court of the United States

October Term, 1996

STEVEN LOWE,

Petitioner,

v.

NUECES COUNTY, TEXAS,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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60 pp

QUESTIONS PRESENTED

Whether Nueces County's failure to have any policy regarding the use of deadly force or its policy of failing to adequately train police officers in the constitutional limitations on the use of deadly force is sufficient under *City of Canton, Ohio v. Harris*, 109 S.Ct. 1197 (1989), to raise a fact issue on the policy-maker's deliberate indifference when its fully trained officer shoots an unarmed citizen without cause after illegally entering his home to make a warrantless arrest for speeding or reckless driving.

Whether the jury may infer a policy-maker's deliberate indifference when a "single incident" of egregious misconduct occurs and 1) the officer was trained to the highest level of proficiency offered, 2) direct evidence shows a policy of failing to adequately train officers regarding the constitutional limits on the use of deadly force, 3) direct evidence shows a policy or custom of having no policy on the use of deadly force, 4) the officers in charge of training and implementing policy testify the officer acted according to policy and training, and 5) the policy-maker completely fails to review or even consider policy changes after the incident.

Whether a governmental agency with a policy of failing to adequately train police officers not to use unconstitutionally excessive deadly force may avoid liability under § 1983 because another governmental agency with no authority to review or change training policies conducts a criminal investigation of the shooting.

QUESTIONS PRESENTED – Continued

Whether a policy of giving deadly weapons, firearms combat training, and instructions to arrest lawbreakers to officers who are not also given training on the constitutional limits of the use of deadly force, when to use non-violent arrest techniques, and how to lawfully investigate complaints is a "moving force" of injuries suffered when one of the officers who is acting according to training and policy illegally enters an unarmed civilian's home and shoots him while trying to investigate a speeding or reckless driving offense.

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Nueces County, Texas

Steve Lowe

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PETITION FOR WRIT OF CERTIORARI

Steve Lowe respectfully moves the Court to grant this petition, issue a writ of certiorari, review the judgment of the District Court for the Southern District of Texas and the Fifth Circuit, and reverse and remand for a trial on the merits.

OPINIONS BELOW

The Fifth Circuit's opinion is App. 1. A transcript of the hearing on the District Court's oral ruling granting summary judgment is App. 2.

JURISDICTION

The District Court had federal question subject matter jurisdiction because Lowe asserts a claim under 42 U.S.C. §1983.

The Fifth Circuit had jurisdiction because the District Court properly exercised jurisdiction and Lowe timely filed a notice of appeal on March 6, 1996 from the final judgment signed on February 6, 1996. The Fifth Circuit's opinion and judgment issued on December 3, 1996. The motion for rehearing was timely filed on December 24, 1996, and overruled on January 9, 1997.

This petition was timely filed on April 9, 1997. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

U.S. Const. amend IV.

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. §1983.

STATEMENT OF THE CASE

Steve Lowe was standing in his kitchen, unarmed, preparing to eat when two individuals entered and shot him twice. One of the shooters, Bobby Ray Munson, was a reserve deputy constable for Precinct One, Nueces County. Bobby Ray Munson entered Steve Lowe's apartment at gunpoint to investigate a speeding incident. Due to Precinct One's training policy, Bobby Ray Munson had

no training on when the use of deadly force is constitutionally permitted, how to non-violently apprehend suspects, or lawfully investigate alleged crimes. Properly trained officers arrived on the scene and arrested Bobby Ray Munson. His superiors testified Bobby Ray Munson was fully and properly trained according to applicable standards, acted according to Precinct One policy and training at all times, and they had no problems with his conduct. The Precinct One policy-maker conducted no post-shooting policy or training review whatsoever, admitted something like this might happen again, and didn't know if there was anything to prevent another incident.

A. The incident

Considering Nueces County's policy of inadequately training its officers, the events of May 10, 1991, were predictable. Munson was well armed and patrolling alone at about 2:00 AM. Officer Casares, a Corpus Christi Municipal Airport police officer, flagged him down. Casares reported previously observing a car speeding and driving wildly. He stated the driver attempted to run him off the road at gun-point. Casares further reported he followed the car into an apartment complex.

The two sleuths returned to the apartment complex and found the car in a marked parking space. The officers proceeded upstairs to the designated apartment. D.E. # 38, Ex. G, R. 599. As one person left the apartment, they drew weapons, shouted "freeze, police," placed a gun to his head, searched him, cuffed him, and placed him on the balcony floor. D.E. # 38, Ex. G, R. 593. Since the door

was slightly ajar, the officers were able to peek in and see two persons inside. D.E. # 38, Ex. G, R. 594. They took positions on either side of the door. On signal from Munson, both officers entered Lowe's apartment with drawn guns. They shouted, "freeze, police," and each shot once. Munson hit Lowe in the face, Casares hit Lowe in the thigh. He went down immediately. D.E. # 38, Ex. G, R. 595. The officers did not shoot the other occupant.

The Corpus Christi police, a separate agency controlled by the City of Corpus Christi, soon arrived and investigated. Munson and Casares were arrested.

To justify their actions, both officers claimed drugs – stating they smelled burning marijuana or cocaine coming from Lowe's apartment just before their warrantless entry. No cocaine was found. Although a small pipe bowl full of marijuana was found in Lowe's apartment, it was unburnt.

Both officers also claimed they shot because Lowe held something that looked like a gun and he moved suddenly when they entered. D.E. # 38, Ex. G, R. 610. A post-shooting search revealed nothing in Lowe's hands and no gun in the apartment, car, or anywhere else. In retrospect, it appears the officers entered Lowe's apartment at gunpoint to investigate the crime of speeding or reckless driving. Ironically, subsequent investigation showed Lowe was not even driving. These facts undoubtedly raise fact issues regarding whether the officers repeatedly violated Lowe's Fourth Amendment rights.

B. The policy which caused the incident

This case involves Nueces County's policies or customs of inadequately training Precinct One reserve deputy constables. These policies caused the shooting and unconstitutional seizure of Steve Lowe. Texas law recognizes a Constable is a policy-maker. *Jett v. Dallas Indep. School Dist.*, 109 S.Ct. 2702 (1989) (whether official is a policy-maker is a question of state law); *Walsweer v. Harris County*, 796 S.W.2d 269 (Tex. App. – Eastland 1990, writ denied), *cert. denied*, 112 S.Ct. 192. The inquiry presented here focuses on the conduct and customs of Johnny Alaniz, the duly elected Precinct One Constable for Nueces County.

1. Overview of Precinct One

Nueces County has eight precincts with a Constable elected to each precinct. Texas law requires Nueces County to fund each Constables' office including payroll for deputy constables. *See* D.E. # 27, Ex. H, R. 1645. By statute, a County may authorize a constable to commission unpaid reserve deputy constables. TEX. LOC. GOV. CODE §86.011 (Vernon 1990). The Nueces County Commissioners Court, the County's elected governing body, approved approximately 22 to 25 reserve deputies for Precinct One. D.E. # 27, Ex. H, R. 1657.

A Constable is a peace officer, and therefore charged by Texas law with various law enforcement duties. TEX. CODE CRIM. PROC. art. 2.12-13. Texas law charges all peace officers, including reserve deputy constables, with the responsibility of enforcing Texas law. *Id.* Precinct One

reserves faced situations involving the potential for violence, including serving arrest warrants, investigating assaults, threats and disturbances inside the courthouse. R. 1627.

More like a social club than a law enforcement agency, almost anyone could join Nueces County's Precinct One reserve officer program. But once in, the reserve officers had all the power of any other law enforcement officer to enforce the law, make arrests, or investigate crime. D.E. # 27, Ex. H., R. 1633. Training and supervision were lax at best. Serious incompetence existed throughout the reserves.

Precinct One reserves sought to operate at no cost to Nueces County, raising their own money for uniforms and equipment, and holding monthly meetings at local cafes. D.E. # 38, Ex. G, R. 548. The reserves selected, trained, and supervised themselves, operating independently of paid deputies. All reserve officers, regardless of rank, were of inferior status to regular officers.

Unlike regular deputies, reserve deputies received no paycheck. D.E. # 27, Ex. H., R. 1633; D.E. # 27, Ex. I, p. 1707. In the words of Jerry Boucher, the Chief Deputy, they were volunteers, comparable to candy stripers at a hospital. R. 1707. Their duties included driving around in police cars, serving legal papers, attending meetings with other reserve deputies, wearing police uniforms, carrying firearms – and enforcing the law. By virtue of their association with the Nueces County Precinct One Constables' office, reserves are fully empowered law enforcement officers with as much authority to make arrests as regular officers.

The only requirements for becoming a reserve officer were to complete the state mandated licencing program, have a relatively clean police record, and be voted into the group by fellow reserve officers. R. 1577; D.E. # 27, Ex. H, R. 1645. The reserves had to attend monthly meetings, donate the minimum number of hours to Nueces County, and continue with the reserve officer advancement training program.

Alaniz, a well known local politician, was more concerned with public service than the day to day operation of the constable's office. He delegated law enforcement duties to Jerry Boucher, his chief deputy, and Major Couser, who was in charge of the reserve officers. R. 1634, 1638, 1641. Although Couser was in charge of training the reserves, and was the only instructor, he was not certified by the state commission in charge of training. D.E. # 38, Ex. G, R. 535.

2. Precinct One training policies

In contrast to Precinct Eight, which had a policy manual an inch and one half thick, Alaniz stated he had no written policy for Precinct One. App. 15; R. 1663. In fact, Alaniz, the policy-maker, showed remarkable ignorance of any policies. R. 1668. Alaniz did admit to a verbal policy of delegating management of the reserves to Boucher and Couser. R. 1663. Boucher, the chief deputy and Major Couser provided oral directives to the officers. R. 1663. Very few written rules existed. In fact, Boucher admitted Precinct One had no policy regarding the use of deadly force. *See City of Canton, Ohio v. Harris*, 109 S.Ct. 1197, 1205 n.10 (1989).

The policies and customs at issue, to the extent they even exist, involve hiring, training and deploying reserve deputy constables. Precinct One accepted reserve deputies who had completed a state mandated training program that was recognized by Boucher, Couser, and Lowe's expert as either inadequate, or the "bare minimum." This training taught officers to shoot paper targets, but did not teach qualitative decisions regarding when the use of force was constitutional. R. 1576; 1596; 1772. Lowe's expert testified that the following specific inadequacies existed in Nueces County's training program:

a) field investigation techniques, including the proper procedures for investigating a "man with a gun" complaint, specifically, identifying the options other than armed confrontation;

b) identifying the need and the procedure for calling in more experienced officers, better-trained officers, or specially-equipped officers;

c) techniques of conflict resolution;

d) apprehension techniques;

e) radio communication; in particular, coordinating back-up with other agencies at a time when the Precinct One dispatcher was off-duty and the calls were routed through another department;

f) use of force and use of deadly force;

g) "shoot/don't shoot" training to cultivate judgment under stress.

Precinct One developed a reserve officer training program to comply with state requirements for continuing officer education. App. 18. This program did nothing to cure these deficiencies. Instead, it offered courses like firearms combat training. Moreover, it was run by Couser, who was not even properly licenced to train. Notably, Munson was trained to Precinct One's highest level, and Couser thought he was fully qualified to investigate the incident in question. Yet Munson acknowledged he had no training that would teach him how to handle this kind of incident, and Precinct One did not offer such training.

The state mandated training was promulgated by TCLEOSE (Texas Commission on Law Enforcement Officer Standards and Education). The TCLEOSE course is a basic licensing course teaching marksmanship, arrests, search and seizure, investigatory techniques, etc . . . This course did not teach qualitative decisions about whether to shoot. R. 1576. The statute expressly required officers to maintain weapons proficiency, TEX. LOC. GOV. CODE ANN. §415.035 (Vernon 1987), but does not expressly require training regarding the constitutional limits on the use of such force. Nor did it attempt to teach practical skills that can only be learned "on the job." Nor did it impose any requirements to supervise officers. D.E. # 27, Ex. I, R. 1706. This training represents the "bare minimum" required for Texas law enforcement officers, jailers, and security officers. D.E. # 27, Ex. I, R. 1705-06.

Significantly, the training required the officers to learn how to shoot paper targets, but not when the use of deadly force is constitutionally permissible. R. 1596; D.E. # 27, Ex. I, R. 1772. It provided no training on the use of non-violent conflict resolution and arrest. Since TCLEOSE

imposed no training or inadequate training on the constitutional limitations on the use of deadly force, paradoxically, Precinct One trained reserve officers to shoot straight, but not to know when to shoot, or how to avoid unnecessarily getting into situations likely to require deadly force.

Precinct One's "reserve advancement program," App. 18, did nothing to remedy these deficiencies. Since the reserves had real day jobs, most training classes were held at nights and weekends. Requirements were routinely waived. D.E. # 38, Ex. G, R. 540. No formal mechanism existed for weeding out below-par officers. D.E. # 27, Ex. I, R. 1729.

One part of Precinct One's reserve advancement program involved teaching officers how to react in clutch situations. This was the "Shoot, Don't Shoot" course. Casares, one of the shooters and a former Precinct One Reserve Officer, who was testifying as a expert, stated "Shoot, Don't Shoot" training would have made the most difference. D.E. # 38, Ex. G, R. 621. Undisputed evidence shows the Constables' office waived "Shoot, Don't Shoot" training requirement for every officer including Officer Bobby Ray Munson. D.E. # 38, Ex. G, R. 540. Contrary to the District Court's finding, App. 6, Munson testified this training was available in South Texas.

Nueces County never provided officers the more important training – how to use non-violent conflict resolution techniques to avoid a situation where an officer had to make a split-second decision whether to shoot. Nueces County provided Precinct One reserve officers no written directives, instruction, or guidance informing

them what to do or what they were expected to do. The reserve officers were undertrained and undirected part-time volunteers who could not provide any guidance or on the job training to new officers on how to constitutionally manage foreseeable investigations and arrests. Nueces County Precinct One officers had no opportunity to develop or cultivate personal judgment or maturity which would have taught them to call for back-up, ask for direction or supervision, or to try to investigate this alleged crime through means other than with a gun in Lowe's face.

These failures to adequately train were compounded by the fact that Nueces County provided its officers absolutely no written policy manual regarding the use of force – or anything else. D.E. # 27, Ex. H, R. 1663. Lowe requested in discovery any "documents . . . representing a guide, handbook, or reference intended to communicate departmental or agency standards and policies to Nueces County . . . volunteers on topics such as search and seizure, probable cause, use of force, use of deadly force, constitutional law, or the limits of authority and powers of reserve deputy constables." Only one document was produced. Although not responsive, this was the "rules and regulations Nueces County constables reserve association." App. 24-27. This three page document provided very little guidance indeed. The rules required the officers to remain alert and follow orders. App. 24. Consistent with Texas law, the rules required officers to maintain proficiency with firearms. App. 27.

But the absence of a policy manual was merely a symptom of the larger problem this court repeatedly recognizes: lack of proper policies guiding the officers to perform their difficult and important law enforcement duties in a constitutional manner. Nueces County provided Precinct One officers guns, ammunition, firearms combat training, and a mandate to enforce the law. But it did not train the officers to do so without violating citizens' constitutional rights. Indeed, the training Munson relied upon that night was to treat the situation as if there was a gun, separate the officers to provide two targets, and keep the tactical edge. Notably lacking in Munson's account of the training he relied upon that night was any mention of constitutional constraints on his conduct.

Lowe's expert testified Nueces County's failure to select, train, supervise, direct, and control its officers contributed directly to Lowe's injuries. R. 1589. He further stated that in the absence of written directives the County and Constable could not reasonably hope to expect the officers to know what was expected of them or to perform to professional standards. R. 1603.

The totality of the evidence strongly supports this opinion. This was an accident waiting to happen. And when it happened, Alaniz' response shows he was at all times – before and after the incident – deliberately indifferent to the effect his policies might have on the constitutional rights of persons in Nueces County.

C. Post incident conduct

Amazingly, Nueces County officials made no complaints about the incident to Precinct One. R. 1733. Officer Couser, the officer in charge of training for Precinct One, stated he had no problems with Munson's actions that night. R. 1603. Boucher, the first deputy, told Munson he did not violate policy – because there was none. D.E. # 22, Ex. B, R. 2539-41; D.E. #27, Ex. I, R. 1787. Boucher acknowledged the commissioners court and law enforcement agencies did not review the Precinct One reserve constable program. D.E. # 27, Ex. I, R. 1734. Casares, a former Precinct One Reserve Officer, stated no Precinct One policies or procedures would have affected a reserve officer in their situation. D.E. # 38, Ex. G, R. 600. Munson and Casares showed they acted according to their training by indicating they would do nothing differently if in this situation again. D.E. # 38, Ex. G, R.R. 618-19.

When asked, Alaniz stated his office performed an investigation of the incident, and Boucher performed the investigation. App. 17; R. 1677. When asked what kind of investigation was performed, he stated "I guess gather all the facts about the incident." When asked what the purpose of Boucher gathering the facts, Alaniz stated "I think it's a standard procedure . . . " Alaniz later recanted and admitted Precinct One had no standard procedure to review an incident like this. R. 1678. Alaniz didn't participate in the investigation or receive a written report.

Boucher stated he did not perform an investigation. R. 1746. This is probably why Alaniz didn't receive the report.

No policies or procedures were changed as a result of this incident. R. 1679. Officers were not trained differently. *Id.* No written directives were given to the officers. *Id.* The incident was not officially discussed. *Id.*

Alaniz never gave it any thought as to whether anything could be gained by talking to Munson or looking into the incident. R. 1682.

Alaniz was asked if there was anything to prevent an incident like this from happening again. He replied: "Well, I want to say that it might happen. I don't know. All right. I really don't know, depending upon the circumstances."

SUMMARY OF ARGUMENT

The lower courts erred by ignoring direct and circumstantial evidence raising a fact issue on the policymaker's deliberate indifference and "moving force causation." The evidence of training deficiencies combined with post-shooting conduct demonstrating no interest in reviewing training policy or changing the way things were done in Precinct One is sufficient for the jury to conclude Nueces County was deliberately indifferent.

Glaring deficiencies in training exist, such as training officers to shoot, but not when to shoot, or how to avoid getting in a situation where they had to make a split second decision whether to shoot. Furthermore, the training program reflects no training on non-violent arrest techniques. In short, Nueces County trained the officers to shoot effectively,

but failed to teach constitutional limits on the use of force. This evidence raised a fact issue on causation.

REASONS FOR GRANTING THIS PETITION

This case is special and important because the evidence shows Nueces County did nothing to create or implement policies to guide the officers to perform their difficult and important duties in a constitutional manner. Considering the number of decisions from this Court emphasizing the importance of enacting policies guiding employees' conduct along constitutional lines, this failure is more significant than the incident itself. Even more troubling is the absence of post-incident policy review after an incident consistent with a severe policy failure. After all, if the persons responsible for making and implementing policy are saying Bobby Ray Munson did not violate policy and training, and his actions resulted in egregious Fourth Amendment violations, the policy should at least be reviewed.

On a more fundamental level, surely one intended effect of the Court's §1983 jurisprudence is to strongly encourage municipalities to implement policies likely to protect constitutional rights. It would significantly advance this goal for the Court to squarely hold evidence of an inadequate post-incident policy review after a fairly egregious "single incident" is sufficient to support a finding of deliberate indifference. Such a holding would properly encourage municipalities to focus efforts on policy review when the first violation occurs, and not only after repeated constitutional violations raise the specter

of liability. This holding accommodates the *Canton* Court's concern that a "single incident," without more, does not prove causation and deliberate indifference. Also, it accommodates the rights of those affected by a municipality's failure to review defective policies which generate constitutional violations.

But most importantly, if policy is the issue, municipalities should be encouraged to promptly review defective policies. Simply viewing the facts of this incident, reasonable minds question whether some official policy caused or contributed to the problem. The conclusion becomes inescapable considering the admissions that Bobby Ray Munson violated no policy.

Important questions presented concern the type and quantum of evidence necessary to avoid summary judgment in a §1983 claim alleging inadequate training. In particular, is the incident, plus the post-incident conduct shown here sufficient to raise a fact issue on deliberate indifference? Another key issue embedded in this case is whether summary judgment should be granted if the governmental unit shows one of several policy-makers with different duties and no responsibility for training policy is not deliberately indifferent. Furthermore, this case presents the question of the sufficiency of the evidence supporting causation.

The reason why these questions are important are two-fold. First, this Court should state when and how circumstantial evidence, including evidence arising from post-incident conduct, is sufficient to raise a fact issue on deliberate indifference. This is important because most if

not all evidence of deliberate indifference is circumstantial, as policy-makers are unlikely to admit this fact. Second, by identifying circumstances in which post-incident conduct raises an inference of deliberate indifference or causation, this Court will encourage governmental units to conduct appropriate post-incident policy review to ensure relevant policies are unlikely to infringe constitutional rights. Regardless of the outcome, the Court's opinion here will result in a significant post-*Canton* §1983 decision which will do something Nueces County failed to do: provide badly needed guidance.

ANALYSIS

Without much explanation or analysis, the Fifth Circuit concluded no evidence exists showing deliberate indifference or "moving force" causation. This holding would make more sense if an earlier decision from the Fifth Circuit was not now in question due to later decisions. Dicta in the Fifth Circuit's decision in *Rhode v. Denson*, 776 F.2d 107 (5th Cir. 1985), *rehearing en banc denied*, 778 F.2d 790, *cert. denied*, 106 S.Ct. 1292 (1986), stated a Texas Constable is not a policy-maker. *Rhode* involved a Constable committing an episodic tort, not making policy, and is distinguishable for other reasons as well. Thus, *Rhode* may well have been correctly decided for the wrong reason.

After *Rhode* was decided, this Court ruled whether a particular official is a policy-maker is a question of state law. *Jett v. Dallas Indep. School Dist.*, 109 S.Ct. 2702,

2723-24 (1989). Texas courts promptly concluded a constable making policy decisions was a policy-maker. *Walsweer v. Harris County*, 796 S.W.2d 269 (Tex. App. – Eastland 1990, writ denied), *cert. denied*, 112 S.Ct. 192. Under the analysis set forth in *City of St. Louis v. Pratprotnik*, 108 S.Ct. 915 (1988), Alaniz was either Nueces County's final policy-maker in the policy decisions and customs implicated here or Nueces County's delegee.

Nevertheless, the Fifth Circuit has yet to harmonized *Rhode*, and indeed, still follows *Rhode* because the evidence of Alaniz' conduct and mental state was not reviewed in that Honorable Court's opinion to determine whether Nueces County's policies caused Lowe's injuries, or whether Nueces County was deliberately indifferent. When this evidence is considered, it easily defeats summary judgment.

CAUSATION

The facts discussed above show Nueces County had a policy of inadequately training Precinct One reserve deputy constables to perform their foreseeable duties in a constitutional manner. The policies principally include sending armed, inexperienced, inadequately trained officers into the field and charging them with law enforcement duties. In light of the fact that the officers were expected to enforce the law and fully empowered by Texas law to do so, these policy deficiencies were so likely to cause a severe deprivation of rights that a jury

could reasonably find Nueces County's inadequate policies were the moving force behind the deprivation of Lowe's rights.

The specific deficiencies in Nueces County Precinct One's training program include teaching firearms combat training, teaching them how to shoot, but not when it is constitutionally permissible to shoot, failing to adequately teach fourth amendment limits on police conduct, and failing to teach nonviolent arrest techniques. The state mandated training program taught officers how to shoot paper targets, but failed to teach them constitutional limits. In fact, Nueces County Precinct One officers received no training whatsoever regarding the use of non-violent conflict resolution techniques. This was compounded by the absence of a written policy to direct the officers' conduct. Yet, Munson was fully trained to the highest level – according to Precinct One.

Lowe's expert testified Nueces County's failure to train officers contributed directly to Lowe's injury, and Alaniz couldn't hope to expect the officers to perform properly without written directives. After the incident, Boucher testified that he told Munson no policy violation occurred because there was no policy. Boucher and Couser stated Bobby Ray Munson acted properly. Yet the uncontroverted evidence showed egregious Fourth Amendment violations.

> [F]or liability to attach . . . the identified deficiency in a city's training program must be closely related to the ultimate injury. Thus, in the case at hand, respondent must still prove that the deficiency in training actually caused the police officers' indifference to her medical

> needs. Would the injury have been avoided had the employee been trained under a program that was not deficient in the identified respect?

City of Canton, 109 S.Ct. at 1206.

In *City of Canton* this Court stated that judge and jury, doing their respective jobs, will be adequate to the difficult task of determining whether a properly trained officer would have acted differently under the circumstances. *Canton, Ohio*, 109 S.Ct. at 1206. The identified deficiencies included the failure to adequately train in the constitutional limits on the use of deadly force. *Canton, Ohio*, 109 S.Ct. at 1205 n. 10. The question is whether properly trained officers would have not shot Mr. Lowe.

In this case, a jury could find properly trained officers would have acted differently. Mr. Lowe was standing in his kitchen, unarmed. Munson and Casares entered with weapons drawn and shot Mr. Lowe. After the illegal entry and shooting, properly trained officers arrived and arrested Munson and Casares.

Not only would properly trained officers have not shot Mr. Lowe, properly trained officers determined Munson's and Casares' acts were so egregious to warrant their arrest. The district attorney determined to prosecute the two. The only persons concluding Bobby Ray Munson's actions were proper were those charged with implementing the Constable's training policy. There is no question but that officers who received proper training regarding citizens' constitutional rights immediately recognized Munson's conduct was criminal. Indeed Nueces County never alleged Munson did not violate Lowe's rights or that he was not fully trained. This is some

evidence that Munson and Casares' acts strayed far outside permissible or acceptable errors of judgment because of training deficiencies.

Nueces County had no policy regarding the use of deadly force. Nueces County had a policy of inadequately training its officers regarding constitutional limits on the use of deadly force. This egregious incident is precisely what one would expect from improper training policies. After the incident, the persons charged with implementing policy stated no policy violations occurred, and a fully trained Bobby Ray Munson acted according to his training. Properly trained officers recognized the incident for what it was – a shocking Fourth Amendment violation. Based on these facts, a judge and jury could reasonably determine a properly trained officer would have acted differently under these circumstances.

DELIBERATE INDIFFERENCE

Q. Back in May of 1992, did the Constable's office have any kind of policies on the use of deadly force by any of its officers?

A. No.

Deposition of Jerry Boucher, chief deputy of Precinct One.

> [C]ity policymakers know to a moral certainty that their police officers will be required to arrest fleeing felons. The city has armed its officers with firearms, in part, to allow them to accomplish this task. Thus, the need to train officers in the constitutional limitations of the use of deadly force, *see Tennessee v. Garner*, 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed. 2d 1 (1985), can

> be said to be "so obvious," that failure to do so could properly be characterized as "deliberate indifference" to constitutional rights.

City of Canton, 109 S.Ct. at 106. All nine members of the Court agreed with this principle. *Id.* at 1209 (O'Connor concurring and dissenting in part). Precinct One had no policy on the use of deadly force. It offered no training on the constitutional limitations on using deadly force. Yet it armed its officers with deadly weapons, provided firearms combat training, and instructed them to enforce the law. From this evidence standing alone a jury could reasonably infer and find Alaniz and therefore Nueces County were deliberately indifferent to Lowe's rights. However, there is more.

We know a "single incident" of police misconduct is insufficient circumstantial evidence to raise a fact issue on whether the policy-maker was deliberately indifferent to a party's constitutional rights. *City of Oklahoma City v. Tuttle*, 105 S.Ct. 2427 (1985). In *Tuttle*, the District Court instructed the jury: "a single excessive use of force may be sufficiently out of the ordinary to warrant an inference that it was attributable to inadequate training and supervision amounting to deliberate indifference." This Court reversed, holding evidence of a "single incident" is insufficient evidence to establish deliberate indifference because this would permit a plaintiff to establish municipal liability without proof of a "single action taken by a municipal policy-maker" and require affirmance in the face of uncontroverted evidence that no policy failure caused the deprivation. If this were not so, liability could

attach in cases in which no impermissible municipal policy or deliberate indifference existed.

Tuttle is no bar to the instant action. In contrast to *Tuttle*, this record shows inadequate training on the constitutional use of deadly force, no policy on the use of deadly force, an egregious "single incident" involving the use of deadly force by a fully trained officer, and admissions of those charged with implementing policies that Bobby Ray Munson acted according to policy. Moreover, the "single incident" is exactly what one would expect from an organization with defective policies guiding its officers' conduct. This case falls squarely within *Canton* where all members of this Court agreed failure to train officers in the constitutional limits in the use of force was deliberate indifference. The instant case presents this, however, there is more.

This Court in *McDonnell-Douglass Corp. v. Green*, 411 U.S. 792, 802 (1973), recognized circumstantial evidence is sufficient to raise a question of material fact of the mental state of intent to discriminate in a Title VII case. *McDonnell-Douglass* held a prima facie case of discrimination is established if the applicant belongs to a racial minority, he applied for a job for which he was qualified, he was rejected, and the employer continued seeking an employee with the applicant's qualifications. Thus, post-employment conduct, *i.e.* continuing to seek an employee with the applicant's qualifications, is sufficient circumstantial evidence to support the inference that race was a factor in the earlier employment decision.

This case is similar. Here the single incident, like an employer's rejection of the applicant, is insufficient to

raise a fact issue. *Tuttle*, 105 S.Ct. 2436. However, the incident combined with post-incident conduct, like continuing to seek applicants with similar skills, or in this case, Nueces County's complete indifference to reviewing or changing policy, creates a fact issue for the jury. *See Grandstaff v. City of Borger, Texas*, 767 F.2d 161 (5th Cir. 1985).

Unlike *Tuttle*, the evidence here shows Alaniz didn't change or even review policy after the incident. Moreover, those charged with implementing Precinct One policies acknowledged Munson was fully trained according to their standards, stated they had no problem with Munson's actions that night, and further stated he violated no policy. Considering this, in combination with the other evidence of deliberate indifference, a jury could reasonably infer Alaniz was deliberately indifferent to Lowe's constitutional rights before – as he was after the shooting. Alaniz' lack of review or willingness to change policies says so much about Nueces County's deliberate indifference. The Fifth Circuit's decision to affirm summary judgment on this ground must be reversed.

In the instant case, the Fifth Circuit wholly failed to reconcile the facts of the instant case with this Court's repeated analysis of the relationship between the policy, the policy-maker's mental state, and the constitutional violation. This is inexplicable since the Fifth Circuit recognized in *Grandstaff* that post-shooting conduct was relevant to show the policy-maker's deliberate indifference. In this case, the Fifth Circuit distinguished *Grandstaff*, writing: "As Munson was released from his position as reserve deputy constable and was prosecuted by Nueces County district attorney, and there was an investigation

into the incident, albeit not by the Precinct One constable, *Grandstaff v. City of Borger*, 767 F.2d 161 (5th Cir. 1985), is not in point." App. 2. In other words, the Fifth Circuit held this evidence conclusively rebutted the fact issue raised by Alaniz' conduct or conclusively established an affirmative defense.

This presents another question, which is whether the Corpus Christi Police Department's on the scene investigation or the District Attorney's decision to indict somehow immunizes Nueces County for Alaniz' §1983 violation of Lowe's rights. The answer is no.

Nueces County acts through many agents, some of whom are policy-makers. As this Court repeatedly recognizes, policy-makers may individually or jointly enact a policy which violates a person's rights, which with other circumstances may yield liability under §1983.

The relevant policy-maker's mental state is the focus of the deliberate indifference analysis. Whether other policy-makers are deliberately indifferent regarding a different policy area is not dispositive. *Praprotnik*, 108 S.Ct. at 926. Moreover, no evidence shows Nueces County or Alaniz relied upon the investigation or indictment as a factor in deciding not to review policy – or anything else.

Nueces County District Attorney's actions are some evidence that Nueces County was not deliberately indifferent in the area of assessing criminal penalties against errant officers, but that is not questioned. The evidence set forth above is sufficient to show Nueces County was deliberately indifferent regarding policies to hire and adequately train Precinct One reserve officers. This is questioned.

Corpus Christi Police Department's on the scene investigation is no evidence of Nueces County's mental state regarding training policies and the use of deadly force.

Since evidence supporting deliberate indifference exists, summary judgment was improper. Under standard summary judgment procedure, evidence of some diligence by a policy-maker with different duties does not conclusively negate the relevant policy-maker's deliberate indifference or conclusively prove an affirmative defense.

Thus, one problem with the Fifth Circuit's analysis is no evidence shows Nueces County authorized the District Attorney to make county-wide policy or review policy regarding reserve deputy constable training, or that of Precinct One. His actions in prosecuting or conducting a criminal investigation are of little, if any, relevance to the question of Nueces County's mental state with respect to such policies.

Another problem is the Fifth Circuit failed to apply the proper standard of review, which resolves disputed fact issues in favor of the non-movant. Here the lower courts improperly held some disputed controverting summary judgment evidence conclusively rebuts Lowe's *prima facie* §1983 case or conclusively establishes an affirmative defense.

To conclude, the mental state of the policy-maker making the policy giving rise to the §1983 claim is the correct focus of analysis. That policy-maker is Alaniz. Since the evidence raises a fact issue regarding his and

therefore Nueces County's deliberately indifferent mental state, this judgment must be reversed.

CONCLUSION

Steve Lowe respectfully moves the Court to grant this petition for writ of certiorari, hear this matter, and reverse and remand for a trial on the merits. Alternatively, Lowe moves the Court to remand to the Fifth Circuit for further proceedings, if the Court deems such necessary. Lowe further moves for all other relief to which he is entitled.

Respectfully submitted,

CRAIG S. SMITH

DONALD B. EDWARDS

JOSEPH HUERTA

DOUG ALLISON

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-40224

STEVEN LOWE,

Plaintiff-Appellant,

versus

JOHN GABRIEL CASARES, Individually, and In his Official Capacity as Safety Officer for the City of Corpus Christi Police Department, ET AL.,

Defendants,

NUECES COUNTY, TEXAS,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Texas

(CA-94-CV-234)

(Filed Dec. 03, 1996)

Before REAVLEY, GARWOOD and BENAVIDES, Circuit Judges.*

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*Pursuant to Local Rule 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

PER CURIAM:

Having considered the briefs and the relevant portions of the record, this Court concludes that the district court properly granted the motion for summary judgment of defendant-appellee Nueces County. For the reasons orally stated by the district court, we agree that there was no summary judgment evidence which would sustain a finding that any of the claimed deficiencies in training or hiring policy on the part of the County amounted to deliberate indifference to the constitutional rights of its residents as required by *City of Canton v. Harris*, 109 S.Ct. 1197 (1989). Nor has an adequate nexus been shown between the alleged training or hiring inadequacy and the injury suffered, as required by *City of Canton. See also City of Oklahoma City v. Tuttle*, 105 S.Ct. 2427, 2436 (1985). As Munson was released from his position as reserve deputy constable and was prosecuted by the Nueces County district attorney, and as there was an investigation into the incident, albeit not by the precinct one constable, *Grandstaff v. City of Borger*, 767 F.2d 161 (5th Cir. 1985), is not in point. The judgment of the district court is accordingly

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

STEVEN LOWE, PLAINTIFF,	)	CIVIL ACTION CA-C-94-234
VS.	)	CORPUS CHRISTI, TEXAS JANUARY 11, 1996
CITY OF CORPUS CHRISTI, ET AL, DEFENDANTS.	)	(Filed May 8, 1996)

FINAL PRE-TRIAL CONFERENCE

BEFORE THE HONORABLE HAYDEN W. HEAD, JR., JUDGE, UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT

APPEARANCES FOR:

THE PLAINTIFF:	MR. DOUGLAS H. ALLISON P.O. BOX 23080 CORPUS CHRISTI, TEXAS 78403
THE DEFENDANTS:	
CITY OF CORPUS CHRISTI	MR. MICHAEL TERRY P.O. DRAWER 480 CORPUS CHRISTI, TEXAS 78403
NUECES COUNTY, TEXAS	MR. WALTER BRYAN MS. SANDY GILL 901 LEOPARD CORPUS CHRISTI, TEXAS 78401

THE COURT RECORDER: MS. JUDITH F. ALVAREZ

PROCEEDINGS RECORDED BY
ELECTRONIC SOUND RECORDING.

TRANSCRIPT PRODUCED BY
TRANSCRIPTION SERVICE:
JEAN BARTZ
P.O. BOX 18648
CORPUS CHRISTI, TEXAS 78480
(512) 937-8057

* * *

[p. 2] (Proceedings commenced at 8:56 a.m.)

THE CLERK: C-94-234, Steven Lowe versus City of Corpus Christi. May I have appearances, please.

MR. BRYAN: Walter Bryan and Sandy Gill for Nueces County.

MR. ALLISON: Doug Allison for plaintiff Steve Lowe.

MR. TERRY: Michael Terry for City of Corpus Christi.

THE COURT: We need to talk some more about these motions for summary judgment. Do you want to be heard, Mr. Terry? Then why don't you two be seated. Do you want to be heard anymore?

MR. TERRY: Not unless Your Honor has specific questions.

THE COURT: Mr. Bryan, do you want to address the Court any further with respect to your motion?

MR. BRYAN: Yes, Your Honor. I don't know if the Court wants me to do it from behind the podium.

THE COURT: You can stay where you are.

MR. BRYAN: Your Honor, we still feel that on the training issue that is before the Court is that all of the evidence that we submitted at summary judgment time shows that Mr. Munson had had that particular training, the shoot-don't-shoot, that was simply called something else that he had while he was in the military. We also submitted for the Court Mr. Munson's [p. 3] training background and everything that they say that Mr. Munson needed he had gotten not only at Del Mar but he had also gotten the same exact training from the military police. And, as a matter of fact, other than training for excessive force –

THE COURT: Thank you. Do you have anything? I don't mean to interrupt. I just remember all this. I remember. I've heard this before.

MR. ALLISON: Nothing new unless there's a specific area.

THE COURT: You don't have a constitutional case and the motions are granted. You have a Texas Tort Claims Act case against one defendant, the City of Corpus Christi. You don't have a Texas Tort Claims Act case against the City – I mean against the County. We can take it a couple of different ways here. And I know you feel strongly about this case and I don't blame you for feeling strongly abut the case, because I feel strongly about it, too. But the facts don't add up to a constitutional claim. With respect to training, both officers were

required by their employers to be certified police officers and to undergo the requirements – the educational requirements and the training requirements of the State of Texas before they could be certified police officers. The shoot-don't-shoot theory has no merit except common sense in your view and maybe other views. It's not a requirement of the State of Texas. One deficiency in training does not amount to a constitutional [p. 4] violation. There is no gross negligence or deliberate indifference on the part of any of these governmental institutions in their decision to hire and train these two men. Could it be done better? It can be done better. It could have been done better in both instances. That's not the standard. It is not a negligent standard. And interestingly, the training issue with respect to shoot-don't-shoot, which I think is the major part of your case here, has some factual basis for its desirability in the part of the records of the defendant, and the fact that they want Nueces County or the particular constable's office involved had that as a program, as a step. I think there's some evidence in the record that maybe Munson might have had it similarly. But the fact is is [sic] that the reason that he didn't have it here is its unavailability in the region. There is no evidence in the record to suggest that any one in the region sponsors it. What your approach to the case would result in would be a decision that would say that by fiat – by judicial fiat that no officer is properly trained unless he has – or she has shoot-don't-shoot course. Secondly, you've got to have it here in the area and available at all times. And thirdly, the requirements of the State of Texas that don't require it are constitutionally invalid. I'm not going to make that step. I think that the State of Texas,

when it licenses and certifies its peace officers, as I read the requirements and as I went through them, are reasonable, thorough-going requirements, and that the [p. 5] communities and municipalities that hire certified police officers have a right to rely upon the statements of the Texas Commission on Law Enforcement, Officer Standards and Education, is what's appropriate unless the particular offices – officer is going to be doing a particular type of police work of need for specialized training. That's not the – that's not what happened in either one of these cases. There's no reason to require further training beyond the ordinary, and no reason for any community to expect that once they have a certified police officer before them that it is an unconstitutional part if they don't do something else, because you say here "shoot-don't-shoot", somebody else comes along and finds another exception. Maybe in a Texas Tort Claims case some jury will decide the opposite. I don't think so. But it's not going to be the decision of this Court that 42 USC 1983, the Civil Rights statute, shows that it is a violation of a citizens's civil rights because the community employing the police office has not employed a shoot-don't-shoot standard which is not required by state law.

Now, hiring. You have two different hirers. You haven't alleged that the City did anything improper when it hired Casares. What you've alleged is with respect to Munson, that there should have been an examination – a more thorough-going examination into Munson's background. The sole, as far as I can tell – the sole fault you find with that aspect of it is that the City didn't call Munson's last employer – or the [p. 6] County didn't call Munson's last employer, but what the County did do

was (a) when they hired him make sure he was certified, put him through a training course. He did go through a graduated – and that's training, I'll have to get back into that, I resolved that for myself. There was a background check accomplished. The only untoward thing he didn't do – that the City – that the County didn't do was to call the last employer. Would that have been a smart thing to do? Yeah, that would've been a smart thing to do. Would you do it? Probably. When you hire somebody for your office? Probably. Is it grossly indifferent – I mean, is it consciously indifferent and grossly negligent if you don't? No, it's not. That is only one factor out of an entire array of factors that Nueces County undertook when they hired this man. They obtained his background. They put him through an examination and a T-close (phonetically) examination. I don't find anything wrong with the hiring aspects of it.

You want also to re-address two policies that the Government has re-addressed – not re-addressed, read-just – two policies that I think are constitutional policies and that the communities can undertake. That is (a) the existence of reserve officers and (b) the way the City of Corpus Christi has the police officers occupying dual roles or triple roles – multiple roles at the airport. You find fault with the decision of the constable here, and as far as I can tell it would be like a [p. 7] sheriff's office or anyone else that has reserve officers, and you find fault that they handle them differently than they do their full-time deputies. And you say that they – both of them are somehow secondary police forces. First of all, it's not an unconstitutional policy to have reserve officers or multi-purpose employees at an airport. Those are constitutional

choices that can be made by a City. They are not made with gross indifference – or County, they're not made with gross indifference or grossly negligent. We should be glad that there are persons who want to be reserve officers and contribute their time and be willing to serve for no pay. It may be easy for some to look down their nose or make a slight knowing smirk while they're just a reserve officer and they just like to ride around and act like cops. But the fact is is that those persons provide a substantial benefit to the community. They are provided for by statutes of the State of Texas. They exist with the blessings of the persons – the people of the State of Texas because they recognize their service can be valuable. Now the fact that the City – County wants to train them differently than the – than the – they train their full-time persons is not unconstitutional. You have not really shown anything more than the fact that they are trained differently, but there's no causation here between that training – or that treatment. You like to call it a second class or a lower caste [sic]. I don't call it that. I see it as different functions. I see it as [p. 8] different people. Now you say they had the same function at the time. Yes, they do. And I think they are trained and permitted to do that. They have the T-close training. That satisfies me.

Now, with respect to the City of Corpus Christi and the way it hires its airport security police. Would it be better to have policemen onboard the Corpus Christi Airport all the time? Probably would. Would it be better to have – and that's because they wouldn't have any confusion about their duties, whether or not they're also supposed to be firemen or greeters or whatever they're supposed to do. Maybe it'd be better to have SWAT-team

members there all the time, too. But the City Council can make that choice. They can decide – that's not an unconstitutional policy. That's not an unreasonable thing for them to do. These persons that they hire are trained. They are certified police officers. They can be hired for a police-officer duty and they can call in assistance when they need it. That's a choice that the City can make and you can't say that that's an unconstitutional choice. That's not grossly negligent, it's not consciously indifferent; it's a choice. Maybe a better choice can be made. I don't know. But this isn't about negligence. It's about gross negligence and conscious indifference and that's not here.

Would it be better – and we talk about whether or not his – Casares – if there's some problem with him acting off the premises and the City bears some responsibility for [p. 9] that. I don't see any other instance in this case where any security officer has acted off the premises that hasn't been corrected. There's obviously no policy of the City of Corpus Christi that they act off of the premises in any way. First of all, that's clearly seen by the fact that they're not Corpus Christi police officers. They don't have a patch that says Corpus Christi police officers. They don't have that chain of command. They don't wear that uniform. They don't show up at the police station. They're not assigned patrols in the city of Corpus Christi. They can't give tickets. They're not given authority to arrest. They're not on the vice squad. They're not on any other squad. They're not part of the police department. They're obviously hired to do airport work. And if we had some indication in the record that they were going beyond that on a consistent – persistent basis, I'm sure

you would have brought it to me. We don't have that in this case.

What we have is one police officer who sees a violation – or one security officer who sees a violation and calls a police officer. He does what he's supposed to do. He doesn't go there and say to himself, "I'll handle this situation." He says, "I'll go find a cop." That's what he did. That's what he was supposed to do. It went bad after that. But that's not, in my view, as a result of any gross negligence or conscious indifference on the part of the City or Mr. Hecht by him failing to say, "Okay, you can only work on airport [p. 10] premises." I think it's obvious that that's what was occurring in this case. So that's my decision.

You can't have a tort claim against the County. There's no County property involved and he's been excluded by the Tort Claims Act case because he's not an employee. So, therefore, you have a lawsuit against Mr. Terry for Texas Tort Claims Act case. We'll try that case on Monday. Ready?

THE CLERK: Tuesday.

THE COURT: Tuesday. Are you ready?

MR. ALLISON: Yes, sir.

THE COURT: Are you ready?

MR. TERRY: Yes, Your Honor.

THE COURT: How long will the case take to try?

MR. ALLISON: Obviously –

THE COURT: You've got the week. I just want to know.

MR. ALLISON: I think it will still take most of the week. Probably all of it, since it's a short week.

THE COURT: What do you think?

MR. TERRY: Week.

THE COURT: Okay, whatever it takes. So, that's the way I see your case. I've given it a lot of thought, because we all want – we all want to see situations like this avoided, but I cannot see that there has been any constitutional violation, and that's a different than a negligent standard that I know you're used to dealing with. I just don't see it here. That's [p. 11] the way I call it. So, now, we have to – do you want to re-draft the pre-trial order given where we are? Or do you want to somehow amend where we are and somebody show me what the – show me the pre-trial order here and –

MR. TERRY: I would prefer an opportunity to confer with counsel before we address the pre-trial order. I do think it needs to be amended.

THE COURT: Do you want to come back at 1:00 o'clock?

MR. TERRY: Yes.

THE COURT: How about 1:30? Maybe you can settle the case. Is that why you asked? Those are nice things. Two o'clock. You're excused.

(Recess from 9:17 a.m. until 2:01 p.m.)

THE COURT: I'm advised that there is a settlement in the case and we do not need to pick a jury. Is that correct?

MR. TERRY: It is, Your Honor. The City of Corpus Christi and Steven Lowe have reached a settlement whereby the City of Corpus Christi will pay to Steven Lowe $125,000 plus costs of court incurred in the prosecution of this case against the City of Corpus Christi.

THE COURT: Is that correct?

MR. ALLISON: That is correct.

THE COURT: Very well. That resolves the matter. You're excused.

MR. TERRY: Thank you, Your Honor.

[p. 12] THE COURT: There are a whole lot more active or even a whole lot greater inaction with respect to what's here. And if you begin to read those cases, there's a particular case – the *Bryan County* case. Look at 674 – 67 F.3d 1174. That's about hiring – that's the kind of case –

(Proceedings concluded at 2:02 p.m.)

* * *

Transcribed by: Jean Bartz

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above entitled matter.

/s/ Jean Bartz
Jean Bartz

May 6, 1996

* * *

[p. 55] Q. What is the purpose of having a Tuesday night neeting [sic], who goes and what do they talk about?

A. As I indicated I can't answer that, because I don't go.

Q. What kind of policies or procedures does Precinct 1 have?

A. I don't have any written policy, sir.

Q. Do you have any kind of oral policies or things that you repeat that you understand that the deputies will follow:

A. My chief deputy from time to time puts out memos, all right. But it's – a lot of it is verbal.

Q. Are you familiar with any of the verbal or written policies that apply to the reserves?

A. Again, there is no written policies. I think mainly Major Couser goes on directives to the officers.

Q. Oral directives?

A. Yes, sir.

Q. Now, do I understand correctly that the reserves are not supposed to patrol by themselves?

A. Not necessarily.

Q. What are the rules about the reserve officers patrolling by themselves or in pairs?

A. As I indicated before, my chief deputy and Major

* * *

[p. 59] Q. Do you know what his responsibilities were?

A. I imagine the same as the other reserve officers.

Q. What about his function within the reserve organization?

A. I have no knowledge of that. I don't recall.

Q. Was there a policy concerning the reserves working on weekends?

A. No, I don't know of any policy. However, the chief could call for a weekend on these reserves to go out on warrants or civil papers or whatever, maybe once a month or one every three months, I don't know.

Q. Do you know about any policy concerning the reserves working when the Precinct 1 dispatcher was off duty?

A. Policy?

Q. Yes.

A. No, I don't remember – I don't know any policy.

Q. Back in '91, '92 did Precinct 1 have some sort of a policy about calling for backup?

A. No, not to my knowledge. I think the officer – the officer himself should know that if he needs a backup, he calls for one.

Q. Based on his training and experience?

A. I'm sorry?

* * *

[p. 69] Q. How did your office go about investigating or reviewing the situation where Bobby Munson discharged his gun?

A. Okay. I guess I was notified the next day that one of my officers had been involved in some kind of mishap, all right, and then I turned it over to Jerry Boucher, who in turn did all the investigation on it.

Q. What kind of investigation did Boucher do?

A. I guess gather all the facts about the incident.

Q. What was the purpose of Jerry Boucher gathering all the facts?

A. Well, I think it's a standard procedure that when an officer gets involved in something you either suspend him pending investigation, with pay – of course, in this case it was a volunteer helper. All right.

Q. Did you participate in the investigation at all?

A. No, sir.

Q. Did you ask any questions?

A. No, sir.

Q. Did you ever receive a report as to what happened?

A. No, sir.

Q. Do you have any firsthand or secondhand knowledge

* * *

DEPOSITION EXHIBIT 2

(SEAL)

901 Leopard Street, Suite 112
Corpus Christi, Texas 78401
(512) 888-0503

PRECINCT 1 CONSTABLE'S DEPARTMENT
NUECES COUNTY, TEXAS

RESERVE ADVANCEMENT PROGRAM

The following is a set of guidelines which will be implemented within the Precinct 1 Reserve Program to ensure that all Reserve Deputies have a well-rounded working knowledge of what the department's functions are. All new reserves entering the program will start out as a Reserve-I and will work his or her way to become a Reserve-IV. Upon becoming a Reserve-IV, that Reserve will automatically become what will be known as a Senior Reserve Officer. A Senior Reserve Officer will have seniority over other Reserves with regard to decision making in the field. A Senior Reserve is not a supervisor but that of an officer who has reached a level who demonstrates that he or she is capable of handling themselves in the field and able to make conscious and intelligent decisions.

An original copy of this Reserve Advancement Program will become a permanent part of your file and updated by your Field Training Officer accordingly.

The following are the guidelines which must be completed within each phase of of the program and also requirements to advance thereafter.

RESERVE-I

1. As an incoming Reserve Officer your first month of duty must be spent in the Precinct 1 office.
2. Absolutely no time will be spent in a patrol car.
3. All 16 hours are to be in uniform while in the office.

The following items must be successfully completed and approved by your Field Training Officer.

1/23 a. Know all of the Precinct 1 boundaries.

1/23 b. Successfully complete Defensive Driving Course provided by Nueces County.

1/23 C. Qualify with side arm to be carried on duty. (unless legal within a year)

1/23 D. Learn Signal Codes.

1/23 E. Put 16 hours of first month in office:

(I) 8 hours of which will be dispatching; and

1/23(II) 8 hours of which will be entering papers into docket books.

1/23 F. Complete 8 hours of "C.P.R. & FIRST AID"

Cleared by FTO to advance to Reserve-II.

/s/ Illegible 1/23
FTO Signature

RESERVE II

1. You are now cleared to ride, but not to drive, with regular deputies who will fill out FTO sheets as required.
2. You will begin your training with your Field Training Officer.

3. You are cleared to work special assignments as approved by your FTO.

4. You *will not* be able to drive a patrol unit unless you are with your FTO.

5. Complete 8 hours of "CIVIL PROCESS" (class room hours)

6. Complete 8 hours of "CIVIL PROCESS" (serving papers)

The general requirement to move from a Reserve-II to a Reserve-III is that you must have a good working knowledge of the civil and criminal papers/warrants handled by Precinct 1. You must not have been suspended and/or reprimanded in writing within the last three months.

Cleared by FTO to advance to Reserve-III.

/s/ Illegible 1/23
FTO Signature

RESERVE III

1. You are now authorized to work and drive in a patrol unit with a Senior Reserve and/or a regular deputy.

2. Complete 8 hour class of "Shoot-Don't Shoot" **NOT AVAILABLE**

3. Complete 8 hour class of "Felonie [sic] Traffic Stops" ✔

4. Complete 8 hour class of "Family Code (Juvenille Laws)" ✔

5. Complete 8 hour class of "Stress Management or First Line Supervisor" **N/AVAILABLE**

Cleared by FTO to advance to Reserve-IV.

/s/ Illegible 1/23
FTO Signature

RESERVE-IV

Jan 17, 1997 Capt. Couser

1. You are now classified as a "SENIOR Reserve". As a senior reserve officer, you are not a supervisor but in the event a decision needs to be made in the field, Senior Reserve status will reign and the decision will be made by that officer.

2. You are authorized to serve civil citations on your own in the event you are unable to find a partner.

3. Senior Reserve Officers must make an honest effort to locate a partner *before* deciding to take a unit out on his/her own. Under *NO* circumstances will warrants be served by a Senior Reserve Officer without a partner unless otherwise approved by your Squad Sergeant. *Your squad Sergeant must be notified and PERMISSION GIVEN BEFORE TAKING A UNIT OUT AT ALL.*

RESERVE-V

This phase of the reserve program is designed for on going training of supervisors.

(Bold represents handwritten copy in original.)

PCT. 1 CONSTABLE'S DEPT.
TRAINING / ADVANCEMENT RECORD

NAME: **Bobby R. Munson Jr.** D.O.B.: **5-24-63**

ADDRESS: **5757 S. Staples #4203** HM. PHONE: **993-7685**

WK. PHONE: **592-5143**

EMPLOYEER: TX. D.L.#: **01803886**

S.S.#: **465-15-5977** D.O.H.: **12-4-90**

SQD.# **2** D.O.R.: **12-7-90**

RANK: **P-2**

---

43 # OF HOURS COMPLETED

HIGH SCHOOL GRAD. COLLEGE GRAD.

YES / NO YES / **NO**

(IF YES, WHAT TYPE OF DEGREE) _____

T.C.L.O.S.E. LICENSE TYPE FULL COMM.
BASIC INTER ADV.

RESERVE COMM.
BASIC INTER.

DATE ISSUED: **11-27-90** (CIRCLE ONE OF THE ABOVE)

TOTAL # OF T.C.L.O.S.E. TRAINING HOURS: _____

TO DATE: _____

NUMBER OF HOURS NEEDED FOR PERIOD OF 199-199: _____

(NOTE: 40 HOURS NEEDED IN A 24 MONTH PERIOD)

D.D.C. YES / NO DATE: **12-10-90**

RENEWAL DUE: **12-10-93**

FIRST AID / C.P.R. YES / NO DATE: **12-15-90**

RENEWAL DUE: **12-15-91**

SHOOTING RANGE DATE: _____

SCORE: _____

RESERVE I	RESERVE II	RESERVE III
12-4-90 DATE	**12-7-90** DATE	**7/25/90LC** DATE

RESERVE IV	RESERVE V
JAN 17, 1992LC DATE	_____ DATE

SIGNAL CODES	DISPATCHING	DOCKET BOOKS
12-4-90 DATE	**12-4-90** DATE	**12-7-90** DATE

CIVIL PROCESS (CLASS):

_____
DATE

CIVIL PROCESS (SERVING PAPERS)	SHOOT – DON'T SHOOT
_____ DATE	_____ DATE

FELONY TRAFFIC STOPS	FAMILY CODE (JUVENILLE)
_____ DATE	_____ DATE

(Bold represents handwritten copy in original.)

DEPOSITION EXHIBIT 4

RULES AND REGULATIONS
NUECES COUNTY CONSTABLES
RESERVE ASSOCIATION

1. All Reserve Deputies will abide by rules and regulations as established by the department. In addition to this, a Reserve Deputy will abide by rules and regulations established for Reserve Deputies.

2. Reserve Officers may be suspended or dismissed from the Constables Department for violations or infractions of any department rules.

3. A Reserve Deputy will acquaint himself with all policies, rules, regulations, orders and procedures which apply to him/her and to the work which he/she is assigned.

4. Reserve Deputies will cooperate with regular officers and members of the department.

5. While on duty, Reserve Officers must remain alert, observant and occupied with the business of the department during their tour of duty with this department.

6. A reserve Deputy Constable to whom a reasonable and lawful order is address by a superior officer or Constable shall not willfully disobey that order.

7. Members of the reserve will be required to maintain a telephone at his residence and advised his supervisor in charge of the reserves of any change in telephone status. This will be done in writing within one (1) week. This will also apply to a change of address.

8. If a reserve officer is going to be out of town for more than one (1) week, he will be required to notify his Sergeant or Lieutenant in writing.

9. A reserve Deputy Constable will make no written or oral statements or discuss any criminal or civil cases concerning this department with any other law enforcement agency without the proper permission from the Constable or Chief Deputy.

10. No reserve will use their private vehicle to make any contacts with the public. Private vehicles are not emergency vehicles and are expressly forbidden to be used as such.

11. Reserve Deputies shall conduct their private and personal life in such a manner as not to bring discredit to themselves, their fellow officers, and most of all the Constables department.

12. Employment as part-time security guards, ball games, bars, stores and etc., is forbidden by this department unless approved by the Constable himself. The minimum wage shall be Ten Dollars per hour or any part thereof.

13. In the event a Reserve Officer becomes sick and is unable to report for his regular assigned duty, he/she shall contact his reserve sergeant or lieutenant in sufficient time to allow him to get a replacement.

14. *Under no circumstances will a Reserve Deputy be allowed to carry a hand gun while off duty. Violation of this rule will result in your dismissal.*

15. The use of the badge and/or I.D. card is for official department business only. Any deviation may be considered reason for suspension or dismissal.

16. Officers becoming involved in any off duty actions must notify this department himself and be followed by a complete report of the incident in writing.

17. There will be a regular scheduled monthly meeting held on the first TUESDAY of every month at 6100

PM unless other wise advised by the Reserve Supervisors.

18. No Reserves will report for duty unless they are in the proper uniform unless otherwise approved by the Constable or Chief Deputy.

19. No reserve will go on duty until it has been approved by Sergeant or Chief.

20. Reserves are to contact only the sergeant or lieutenant for scheduled events. Do not contact the Chief.

21. No Reserve will work as a single man unit unless it has been approved by the Chief Deputy.

22. Attendance at meetings will be required. If you miss three (3) unexcused absences in a year, you will be automatically dismissed from this department.

23. All Nueces County Precinct One functions will take priority over out of county activities.

24. All reserves will abide by all state speed laws except when running emergency calls as approved by dispatcher.

25. All Reserve Officers when working any assigned duties, will remain at there assigned duty place until they have been released by the shift supervisor.

26. The oral board shall consist of three members from the reserve force with one be [sic] a supervisor. The board will be responsible for helping to select new members and as a internal affairs board when needed.

27. If any part of these rules and regulations shall be deemed in conflict with federal or state law, TCLEOSE Rules and Regulations, County Commissions, or Constable's Department policies and procedures, only that part of the rules and regulations shall be rescined [sic].

28. All reserves will be required to work at least 16 hours per month, of which 4 will be dispatching. When the reserve reports for duty, they will first check with the office supervisor, then with the appropriate patrol sergeant for assignment.

29. All Non-paid Regulars are required to complete 40 Hours in service training every two years to stay licensed.

30. All reserves wishing to drive a county owned vehicle may do so after completing a county approved defensive driving course, and being authorized by the Chief Deputy.

31. All reserves will qualify with their duty weapons, before they can carry them on duty. The weapon must be of at least .38 caliber and a minimum of 4 in barrel length.

THE FOREGOING RULES AND REGULATIONS ARE TO BE USED BY ALL RESERVES REGARDLESS OF THEIR APPOINTMENT STATUS WHILE WITH THE CONSTABLE PCI. I DEPARTMENT. THE CONSTABLE AND THE CONSTABLE DEPARTMENT RESERVES THE RIGHT TO AMEND, ADD, DELETE, AND OR SUSPEND ANY AND ALL SAID RULES AND REGULATIONS AS IT SEES NECESSARY FOR THE WELL BEING OF THE DEPARTMENT AT ANY TIME. VIOLATION OF THE RULES AND REGULATIONS CAN AND WILL RESULT THE DISCIPLINARY ACTION.

I have received a copy of and hereby agree to abide by the rules and regulations of the Nueces County Constable's Department Precinct One.

Date and Initial of Deputy

_____

Supreme Court, U.S.
FILED
JUL 1 1997
CLERK

(2)

No. 96-1906

In The

Supreme Court of the United States

October Term, 1996

STEVEN LOWE,

Petitioner,

v.

NUECES COUNTY, TEXAS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Respectfully submitted,

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Nueces County Attorney

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OR CALL COLLECT (402) 342-2831

32 pp

QUESTION PRESENTED

Whether Nueces County may rely on state law for policy regarding the use of deadly force or whether it is required to ignore the state law regarding certification of peace officers and put into writing an entirely different policy that specifically names courses that each new hiree to the position of deputy constable must complete prior to being hired.

Whether a county governmental agency which follows state law on the adequacy of training police officers in the use or non-use of deadly force may avoid liability under § 1983 when a state agency has dictated which courses must be taken and passed before one can become a certified police officer. And such county agency has no reason to offer even more specialized training in the area in light of *City of Canton Ohio v. Harris*, 489 U.S. 378, 109 S.Ct. 1197 (1987).

PARTIES

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RESPONSE TO WRIT OF CERTIORARI

Nueces County respectfully moves the Court to deny Steve Lowe's petition, and allow the judgment of the District Court for the Southern District of Texas and the Fifth Circuit to stand.

OPINIONS BELOW

The Fifth Circuit's opinion is App. 1. A transcript of the hearing on the District Court's oral ruling granting summary judgment is App. 2.

JURISDICTION

The District Court had federal question subject matter jurisdiction because Lowe asserts a claim under 42 U.S.C. § 1983.

The Fifth Circuit had jurisdiction because the District Court properly exercised jurisdiction and Petitioner filed a notice of appeal on March 6, 1996 from the final judgment signed on February 6, 1996. The Fifth Circuit's opinion and judgment issued on December 3, 1996. The motion for rehearing was filed on December 24, 1996, and overruled on January 9, 1997.

This petition was filed on April 9, 1997. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.
U.S. Const. amend IV.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.
42 U.S.C. § 1983.

RESPONDENT'S REPLY

I.

STATEMENT OF THE CASE

Course of proceedings and disposition in the District Court

Petitioner sued Nueces County, the City of Corpus Christi, John Casares and Bobby Munson under 42 U.S.C. § 1983. Petitioner dismissed his claims against the individuals, Munson and Casares and settled a pendant Texas

Tort Claims Act case against the City of Corpus Christi and then dismissed his § 1983 case against the City. Nueces County remained. The Trial Court then granted the County's motion for summary judgment on Petitioner's alleged violations of § 1983. Petitioner now appeals.

Statement of facts

On May 10, 1991, Petitioner was shot by two officers, Munson and Casares. Munson was employed by Nueces County, Casares by the City of Corpus Christi. Munson had been contacted by Casares to assist Casares in "a man with a gun" case. In fact Casares had informed Munson that the gunman had almost ran Casares off the road with reckless driving and gun pointing. Arriving at the location where Casares had tracked the gunman, Munson took the lead as a uniformed officer relying on another peace officers eyewitness accounts. The officers arrested and secured one of the gunman's friends outside the apartment. Moving to the open door of the underlit apartment, the officers smelled marijuana and saw appellant, the gunman, standing with his back to the door. The officers yelled "freeze police". The gunman turned quickly and in a split second in a darkened apartment, the officers thought he still had the gun in his hand and fired upon him. Later no gun was found, but Munson could not know at the time that the information provided by a fellow peace officer was faulty.

II.

ARGUMENT

Petitioner sued Nueces County under 28 U.S.C. § 1983 for the actions of Bobby Munson, a reserve deputy constable. In order to maintain such an action, Petitioner had to show that Munson's actions where the result of some policy or custom of Nueces County, and but for that custom or policy Petitioner would not have been injured. *Monell v. Dept. of Social Services*, 436 U.S. 658 (1978).

Petitioner's argument is simple, even if ultimately flawed. Petitioner argues that 1) Munson's training was inadequate because it was only that which the Texas Commission on Law Enforcement Officer Standards and Education (TCLEOSE); 2) Munson's selection was flawed because one of his former employers signed an after the fact affidavit stating that if his office had been contacted, Nueces County would have found out that Munson was indeed prone to violence; and 3) Since Munson was alone in a vehicle at the time he was contacted by John Casares, there was improper supervision of reserves by Nueces County.

Petitioner's briefs continue to read like *bad* dime store novels. Petitioner attacks the District Court, Precinct One Constable Johnny Alaniz and even the United States Supreme Court. To respond to the Petitioner's logic twisting arguments would be meritless as he has not *changed* the facts to suit his needs. Nueces County maintains the same simple and straightforward argument it presented to the District Court.

III.

FACTS AND PROCEDURAL HISTORY

Nueces County Precinct One Constable supplements his paid deputy constable force with reserves (unpaid volunteers), an uncontroverted fact. Petitioner likened reserves to candy stripers he says because that is what Chief Deputy Boucher had done, but Petitioner forgets or more exactly twists the fact that "candy striper" was among a list that also included volunteer firemen. Truth is the only difference under Texas law between a reserve and a regular peace officer is that one is paid and the other is not. D.E. #21, Ex. D, R. pp. 2868-2871. Tex. Code Crim. Proc. art. 2.12-13.

On the night in question, Bobby Munson was returning the patrol vehicle to the courthouse where patrol units are kept when not in service. John Casares, a person known to Munson as a certified peace officer stopped Munson and asked his assistance in a man with a gun situation. Casares explained that a man had just tried to run him off the road and had pointed a gun at him. Under Texas law, peace officers are allowed to respond to and investigate anonymous calls. Here Munson was relying on the word of a sworn peace officer. *Guzman v. State*, 521 S.W. 2d 267 (1975). Munson had already taken a course similar to "shoot don't shoot", just not called by that name, but "What is Deadly Force and the Use of it". This was not a "book learning" course D.E. #21, Ex. A, R. pp. 2829-2831. Munson and Casares felt that they could handle the situation and relying on training and directives investigated and shot Petitioner. However unfortunate Petitioner's injury, he cannot thrust a constitutional

violation upon Nueces County. Petitioner twists logic when he does not define "shoot don't shoot" but said that Munson recanted having taken similar training, Munson did not recant at D.E. #22 Ex. B, R. p. 2485, D.E. #22, Ex. R, pp. 2521-2522, Munson simply states what other courses may contain.

IV.

ANALYSIS

Petitioner states that Nueces County failed to properly train deputy constables in the use of reasonable force. As noted in the attached deposition excerpts of Bobby Munson D.E. #21, Ex. A, R. pp. 2819-2841. Bobby Munson was at all times a licensed peace officer. Bobby Munson was licensed by the Texas Commission on Law Enforcement Officer Standards and Education (TCLEOSE) by and through the Texas Government Code § 415. Texas law mandates what training is needed by those attempting to acquire or maintain a peace officer's license. D.E. #21, Ex. B, R. pp. 2843-2851 outlines TCLEOSE requirements for 1) § 211.77, the minimum training standards for peace officers; 2) § 211.79, the inservice training credit for license holders; 3) § 211.80, minimum standards for licensing; 4) § 211.65, academy licensing; 5) § 211.66, agreement for training. D.E. #21, Ex. C, R. pp. 2853-2857 relates the course outlines that TCLEOSE provides in response to § 211.65 and § 211.66 of its internal regulations, in regards to reasonable force training. As can be seen in D.E. #21, Ex. B and D.E. #21, Ex. C, another agency regulates training of certified peace

officers and not Nueces County. There is no law or constitutional provision that mandates Nueces County must train above and beyond what TCLEOSE requires.

Petitioner's claim that Defendant Munson repeatedly requested training in different areas of law enforcement are not supported by any evidence. As a matter of fact the only training Defendant Munson was not provided by TCLEOSE or Nueces County that Plaintiff hangs his hat (case) on is that Munson was not given the "Shoot, Don't Shoot" training that was sometimes offered by the Nueces County Sheriff's Department. However, Munson states in D.E. #21, Ex. A that he receive similar training while in the military, prior to coming to Nueces County Precinct One as a volunteer. Munson depo. at D.E. #21, Ex. A, R. p. 2830 Petitioner further discovered from Munson that, Munson knew that while not the same course as Nueces County offered, the military course expressed the purpose to increase the judgment of the armed officer. Munson depo. at D.E. #21, Ex. A, R. pp. 2831-2834. Munson was trained and supervised by Precinct One further by having to ride with a field training officer from November 1990 through January 1992. Munson possessed extensive training in law enforcement, prior to volunteering with Precinct One:

1) Military Police – 1½ years;

2) Arizona Department of Corrections – 1 year;

3) Kleberg County, Texas, Reserve Deputy – 1 year.

Munson's Naval training alone is impressive as well as extensive. See Boucher depo. excerpt attached as D.E. #21, Ex. D, R. pp. 2859-2894. As a matter of law before Petitioner could prevail under § 1983, he would have to

show that inadequacy of training amounted to deliberate indifference, however, since another agency by state law has certified to Nueces County that Munson possessed adequate training (TCLEOSE) Petitioner must go further and show that in light of the duties assigned to specific officers or employees the need for more or different training is so obvious and the inadequacy so likely to result in the violation of constitutional rights, that the policy makers of the county can reasonably be said to have been deliberately indifferent to the need. In that event, the failure to provide proper training may fairly be said to represent a policy for which the county is responsible, and for which the county may be held liable if it actually causes injury. *City of Canton Ohio v. Harris*, 489 U.S. 378, 109 S.Ct. 1197 (1989). Nothing that Petitioner has complained of is any different than what TCLEOSE would/ should have anticipated a peace officer would encounter on routine patrol. There is nothing unique to Corpus Christi in which Munson was not trained. Petitioner has not identified any deficiency in Precinct One's hiring, training, supervising of Munson. Petitioner makes the assertion that Munson's psychological profile showed him to be unfit. Such an assertion is false. Even after the complained-of incident, Munson's psychological profile showed him fit for the job. See Munson's psych. attached as D.E. #21, Ex. A. In *City of Canton* at 1206 the Supreme Court states that the deficiency must be pointed out and proved, in this case Petitioner has pointed out suspected deficiencies, but through his discovery he has proven that such deficiencies *do not* exist.

Secondarily, Petitioner alleges that Nueces County failed to reasonably review the employment background

of Munson. As seen in deposition excerpt of Douglas Tenore D.E. #21, Ex. E, R. pp. 2893-2906, a pre-employment check was done on Bobby Munson, and there were no reports that Bobby Munson was prone to use of excessive or undue force.

Monell specifically rejected government liability based on the doctrine of respondeat superior. Thus, Nueces County cannot be held liable under § 1983 merely because Bobby Munson was a volunteer with Nueces County Precinct One Constables office. Petitioner has yet to show, offer, or discover any evidence that Nueces County condoned any of the alleged actions of Munson and certainly no evidence that Nueces County or any supervisory personnel was present at the scene of the alleged incident. In order to establish supervisor liability Petitioner must show that the inaction on behalf of Nueces County amounted to reckless disregard, deliberate indifference to or tacit authorization of constitutional violations, and not mere negligence. *Howard v. Adkinson*, 887 F.2d 134 (8th Cir. 1989); *Rascon v. Hariman*, 803 F.2d 269 (7th Cir. 1986); *Gutierrez-Rodriguez v. Cartagena*, 882 F.2d 553 (1st Cir. 1989); *City of Canton v. Harris*, 109 S.Ct. 1197 (1989).

Finally under "custom and usage", the Supreme Court has ruled that those practices of state officials must be so permanent and well settled to constitute a "custom and usage". *Adickes v. S.H. Kress and Co.*, 398 U.S. 144 (1970). See also *Monell*. Petitioner has not and cannot plead or prove that Nueces County allowed the alleged behavior to occur on any type of basis (regular or irregular). Petitioner alleges only a single event and in *City of Oklahoma City v. Tuttle*, 471 U.S. 808 (1985), the Supreme

Court ruled that a single, unusually excessive use of force could not stand on its own to make a governmental body liable under § 1983 for the theory of failure to train, supervise or discipline.

Petitioner's claim that Nueces County condoned Munson's act flies in the face of reality. Munson was released as a volunteer with Precinct One Constables office and prosecuted to the fullest extent of the law by the Nueces County District Attorney. See attached D.E. #21, Ex. A.

In an effort to bolster his claim, Petitioner proffered the affidavit of former Kleberg County Sheriff Adan Munoz, a former employer of Bobby Munson. Munoz claims that if anyone from Nueces County had contacted him or his office, he or his office would have told them that Bobby Munson, who was a reserve deputy under Munoz, would be prone to violence. Utter tripe, but nonetheless a matter which might have raised a fact issue. However, Munoz' affidavit was attacked on the grounds that he swore to matters that he could not have had any personal knowledge. Mr. Munoz could only swear that no one called him, further he could not speak for the records of Kleberg County since at the time he signed the affidavit he was not the sheriff or custodian of the records. Nueces County submitted a motion along with exhibits to show the District Court exactly what someone would find out if they contacted the Kleberg County Sheriff's Office in regards to Bobby Munson. D.E. #43, Ex. B, R. 290-291. What Nueces County found was no mention of Munson being violent or gun happy.

Grandstaff Rebuttal

Petitioner makes some noise about Nueces County ignoring what occurred during the incident made the basis of this suit. First, the Constable did not have to investigate the incident, an independent law enforcement agency had already done so. It would have been the height of government redundancy to conduct another investigation. Second, because Major Couser and Chief Deputy Boucher said nothing could be learned from this incident does not infer that excessive force was approved of by Nueces County. Petitioner slips by the very real fact that his own experts, Couser and Boucher, all say that if Munson believed that he was about to be fired upon (having already received information from another peace officer that Petitioner possessed a weapon) then he was justified in using the force he used. Thus, there was no excessive force by Munson. Petitioner's expert begins with the assumptions that Munson and Casares were too green or too stupid to conduct *any* type of investigation, then moves to the outright conclusion that:

> "3. Commonly accepted and nationally recognized standards of police procedure were not followed by defendant officers (Munson and Casares) with specific regard to matters relating to, but not limited to:
>
> a. the investigation of crime,
>
> b. warrantless arrest, search and seizure,
>
> c. apprehension techniques,
>
> d. use of force, deadly force, and alternatives."

D.E. #32, Ex. D, R. 1021. Hard to imagine TCLEOSE missing out on teaching "commonly accepted and nationally recognized standards" in the above basic training courses. Already stated above were the TCLEOSE course requirements and outlines. A policy to follow the law is not void because someone violated the policy. A policy to follow basic and standard training is not void because someone failed to follow the policy. This is not the same case as Petitioner would have this Court drape over the skeleton of *Grandstaff v. City of Borger, Tex.*, 767 F.2d 161 (5th Cir. 1985). In *Grandstaff* this Court recognized that inaction after the shooting of a *clearly* innocent man by numerous police officers could have led a jury to believe that there was a policy to shoot innocents. In *Grandstaff* there were no dismissals or prosecutions; here Munson was dismissed. Here Munson is with the eyewitness and can see that the person wheeling around is not an "innocent" man but the actual gunman according to Casares. *Grandstaff* was not and is not Lowe.

V.

CONCLUSION

Petitioner would have the Courts make "Shoot Don't Shoot" a constitutional right for citizens of the United States. What does this mean? Must all law enforcement officers take only this course? What a boon for the producers of that particular course. The District Court did not err when it chose not to hold that Lowe had a constitutional right to have Munson take "Shoot Don't Shoot" specifically. Petitioner believes that but for this course, the shooting would have been prevented because

Casares, the fellow who did not take this course or any similar course, says it would have done him some good – he dismissed Casares. For Petitioner, reality has finally intruded upon the sanctity of his fantasy.

The District Court did not err in granting summary judgment, nor did the Fifth Circuit err in affirming the District Court's ruling, since there was not material fact issue in dispute.

PRAYER

Respondent prays that this Honorable Court affirm the District Court and the Fifth Circuit by denying Petitioner's request for a Writ of Certiorari thereby upholding Nueces County's Summary Judgment.

Respectfully submitted,

CARL E. LEWIS
Nueces County Attorney

By: WALTER BRYAN
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(512) 888-0700

Counsel for Respondent

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-40224

STEVEN LOWE,

Plaintiff-Appellant,

versus

JOHN GABRIEL CASARES, Individually, and In his Official Capacity as Safety Officer for the City of Corpus Christi Police Department, ET AL.,

Defendants,

NUECES COUNTY, TEXAS,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Texas

(CA-94-CV-234)

(Filed Dec. 03, 1996)

Before REAVLEY, GARWOOD and BENAVIDES, Circuit Judges.*

---

*Pursuant to Local Rule 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

PER CURIAM:

Having considered the briefs and the relevant portions of the record, this Court concludes that the district court properly granted the motion for summary judgment of defendant-appellee Nueces County. For the reasons orally stated by the district court, we agree that there was no summary judgment evidence which would sustain a finding that any of the claimed deficiencies in training or hiring policy on the part of the County amounted to deliberate indifference to the constitutional rights of its residents as required by *City of Canton v. Harris,* 109 S.Ct. 1197 (1989). Nor has an adequate nexus been shown between the alleged training or hiring inadequacy and the injury suffered, as required by *City of Canton. See also City of Oklahoma City v. Tuttle,* 105 S.Ct. 2427, 2436 (1985). As Munson was released from his position as reserve deputy constable and was prosecuted by the Nueces County district attorney, and as there was an investigation into the incident, albeit not by the precinct one constable, *Grandstaff v. City of Borger,* 767 F.2d 161 (5th Cir. 1985), is not in point. The judgment of the district court is accordingly

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

STEVEN LOWE, PLAINTIFF,	)	CIVIL ACTION CA-C-94-234
VS.	)	CORPUS CHRISTI, TEXAS JANUARY 11, 1996
CITY OF CORPUS CHRISTI, ET AL, DEFENDANTS.	)	(Filed May 8, 1996)

FINAL PRE-TRIAL CONFERENCE

BEFORE THE HONORABLE HAYDEN W. HEAD, JR., JUDGE, UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT

APPEARANCES FOR:

THE PLAINTIFF:	MR. DOUGLAS H. ALLISON P.O. BOX 23080 CORPUS CHRISTI, TEXAS 78403
THE DEFENDANTS:	
CITY OF CORPUS CHRISTI	MR. MICHAEL TERRY P.O. DRAWER 480 CORPUS CHRISTI, TEXAS 78403
NUECES COUNTY, TEXAS	MR. WALTER BRYAN MS. SANDY GILL 901 LEOPARD CORPUS CHRISTI, TEXAS 78401

THE COURT RECORDER: MS. JUDITH F. ALVAREZ

PROCEEDINGS RECORDED BY
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[p. 2] (Proceedings commenced at 8:56 a.m.)

THE CLERK: C-94-234, Steven Lowe versus City of Corpus Christi. May I have appearances, please.

MR. BRYAN: Walter Bryan and Sandy Gill for Nueces County.

MR. ALLISON: Doug Allison for plaintiff Steve Lowe.

MR. TERRY: Michael Terry for City of Corpus Christi.

THE COURT: We need to talk some more about these motions for summary judgment. Do you want to be heard, Mr. Terry? Then why don't you two be seated. Do you want to be heard anymore?

MR. TERRY: Not unless Your Honor has specific questions.

THE COURT: Mr. Bryan, do you want to address the Court any further with respect to your motion?

MR. BRYAN: Yes, Your Honor. I don't know if the Court wants me to do it from behind the podium.

THE COURT: You can stay where you are.

MR. BRYAN: Your Honor, we still feel that on the training issue that is before the Court is that all of the evidence that we submitted at summary judgment time shows that Mr. Munson had had that particular training, the shoot-don't-shoot, that was simply called something else that he had while he was in the military. We also submitted for the Court Mr. Munson's [p. 3] training background and everything that they say that Mr. Munson needed he had gotten not only at Del Mar but he had also gotten the same exact training from the military police. And, as a matter of fact, other than training for excessive force –

THE COURT: Thank you. Do you have anything? I don't mean to interrupt. I just remember all this. I remember. I've heard this before.

MR. ALLISON: Nothing new unless there's a specific area.

THE COURT: You don't have a constitutional case and the motions are granted. You have a Texas Tort Claims Act case against one defendant, the City of Corpus Christi. You don't have a Texas Tort Claims Act case against the City – I mean against the County. We can take it a couple of different ways here. And I know you feel strongly about this case and I don't blame you for feeling strongly abut the case, because I feel strongly about it, too. But the facts don't add up to a constitutional claim. With respect to training, both officers were

required by their employers to be certified police officers and to undergo the requirements – the educational requirements and the training requirements of the State of Texas before they could be certified police officers. The shoot-don't-shoot theory has no merit except common sense in your view and maybe other views. It's not a requirement of the State of Texas. One deficiency in training does not amount to a constitutional [p. 4] violation. There is no gross negligence or deliberate indifference on the part of any of these governmental institutions in their decision to hire and train these two men. Could it be done better? It can be done better. It could have been done better in both instances. That's not the standard. It is not a negligent standard. And interestingly, the training issue with respect to shoot-don't-shoot, which I think is the major part of your case here, has some factual basis for its desirability in the part of the records of the defendant, and the fact that they want Nueces County or the particular constable's office involved had that as a program, as a step. I think there's some evidence in the record that maybe Munson might have had it similarly. But the fact is is [sic] that the reason that he didn't have it here is its unavailability in the region. There is no evidence in the record to suggest that any one in the region sponsors it. What your approach to the case would result in would be a decision that would say that by fiat – by judicial fiat that no officer is properly trained unless he has – or she has shoot-don't-shoot course. Secondly, you've got to have it here in the area and available at all times. And thirdly, the requirements of the State of Texas that don't require it are constitutionally invalid. I'm not going to make that step. I think that the State of Texas,

when it licenses and certifies its peace officers, as I read the requirements and as I went through them, are reasonable, thorough-going requirements, and that the [p. 5] communities and municipalities that hire certified police officers have a right to rely upon the statements of the Texas Commission on Law Enforcement, Officer Standards and Education, is what's appropriate unless the particular offices – officer is going to be doing a particular type of police work of need for specialized training. That's not the – that's not what happened in either one of these cases. There's no reason to require further training beyond the ordinary, and no reason for any community to expect that once they have a certified police officer before them that it is an unconstitutional part if they don't do something else, because you say here "shoot-don't-shoot", somebody else comes along and finds another exception. Maybe in a Texas Tort Claims case some jury will decide the opposite. I don't think so. But it's not going to be the decision of this Court that 42 USC 1983, the Civil Rights statute, shows that it is a violation of a citizens's civil rights because the community employing the police office has not employed a shoot-don't-shoot standard which is not required by state law.

Now, hiring. You have two different hirers. You haven't alleged that the City did anything improper when it hired Casares. What you've alleged is with respect to Munson, that there should have been an examination – a more thorough-going examination into Munson's background. The sole, as far as I can tell – the sole fault you find with that aspect of it is that the City didn't call Munson's last employer – or the [p. 6] County didn't call Munson's last employer, but what the County did do

was (a) when they hired him make sure he was certified, put him through a training course. He did go through a graduated – and that's training, I'll have to get back into that, I resolved that for myself. There was a background check accomplished. The only untoward thing he didn't do – that the City – that the County didn't do was to call the last employer. Would that have been a smart thing to do? Yeah, that would've been a smart thing to do. Would you do it? Probably. When you hire somebody for your office? Probably. Is it grossly indifferent – I mean, is it consciously indifferent and grossly negligent if you don't? No, it's not. That is only one factor out of an entire array of factors that Nueces County undertook when they hired this man. They obtained his background. They put him through an examination and a T-close (phonetically) examination. I don't find anything wrong with the hiring aspects of it.

You want also to re-address two policies that the Government has re-addressed – not re-addressed, read-just – two policies that I think are constitutional policies and that the communities can undertake. That is (a) the existence of reserve officers and (b) the way the City of Corpus Christi has the police officers occupying dual roles or triple roles – multiple roles at the airport. You find fault with the decision of the constable here, and as far as I can tell it would be like a [p. 7] sheriff's office or anyone else that has reserve officers, and you find fault that they handle them differently than they do their full-time deputies. And you say that they – both of them are somehow secondary police forces. First of all, it's not an unconstitutional policy to have reserve officers or multi-purpose employees at an airport. Those are constitutional

choices that can be made by a City. They are not made with gross indifference – or County, they're not made with gross indifference or grossly negligent. We should be glad that there are persons who want to be reserve officers and contribute their time and be willing to serve for no pay. It may be easy for some to look down their nose or make a slight knowing smirk while they're just a reserve officer and they just like to ride around and act like cops. But the fact is is that those persons provide a substantial benefit to the community. They are provided for by statutes of the State of Texas. They exist with the blessings of the persons – the people of the State of Texas because they recognize their service can be valuable. Now the fact that the City – County wants to train them differently than the – than the – they train their full-time persons is not unconstitutional. You have not really shown anything more than the fact that they are trained differently, but there's no causation here between that training – or that treatment. You like to call it a second class or a lower caste [sic]. I don't call it that. I see it as different functions. I see it as [p. 8] different people. Now you say they had the same function at the time. Yes, they do. And I think they are trained and permitted to do that. They have the T-close training. That satisfies me.

Now, with respect to the City of Corpus Christi and the way it hires its airport security police. Would it be better to have policemen onboard the Corpus Christi Airport all the time? Probably would. Would it be better to have – and that's because they wouldn't have any confusion about their duties, whether or not they're also supposed to be firemen or greeters or whatever they're supposed to do. Maybe it'd be better to have SWAT-team

members there all the time, too. But the City Council can make that choice. They can decide – that's not an unconstitutional policy. That's not an unreasonable thing for them to do. These persons that they hire are trained. They are certified police officers. They can be hired for a police-officer duty and they can call in assistance when they need it. That's a choice that the City can make and you can't say that that's an unconstitutional choice. That's not grossly negligent, it's not consciously indifferent; it's a choice. Maybe a better choice can be made. I don't know. But this isn't about negligence. It's about gross negligence and conscious indifference and that's not here.

Would it be better – and we talk about whether or not his – Casares – if there's some problem with him acting off the premises and the City bears some responsibility for [p. 9] that. I don't see any other instance in this case where any security officer has acted off the premises that hasn't been corrected. There's obviously no policy of the City of Corpus Christi that they act off of the premises in any way. First of all, that's clearly seen by the fact that they're not Corpus Christi police officers. They don't have a patch that says Corpus Christi police officers. They don't have that chain of command. They don't wear that uniform. They don't show up at the police station. They're not assigned patrols in the city of Corpus Christi. They can't give tickets. They're not given authority to arrest. They're not on the vice squad. They're not on any other squad. They're not part of the police department. They're obviously hired to do airport work. And if we had some indication in the record that they were going beyond that on a consistent – persistent basis, I'm sure

you would have brought it to me. We don't have that in this case.

What we have is one police officer who sees a violation – or one security officer who sees a violation and calls a police officer. He does what he's supposed to do. He doesn't go there and say to himself, "I'll handle this situation." He says, "I'll go find a cop." That's what he did. That's what he was supposed to do. It went bad after that. But that's not, in my view, as a result of any gross negligence or conscious indifference on the part of the City or Mr. Hecht by him failing to say, "Okay, you can only work on airport [p. 10] premises." I think it's obvious that that's what was occurring in this case. So that's my decision.

You can't have a tort claim against the County. There's no County property involved and he's been excluded by the Tort Claims Act case because he's not an employee. So, therefore, you have a lawsuit against Mr. Terry for Texas Tort Claims Act case. We'll try that case on Monday. Ready?

THE CLERK: Tuesday.

THE COURT: Tuesday. Are you ready?

MR. ALLISON: Yes, sir.

THE COURT: Are you ready?

MR. TERRY: Yes, Your Honor.

THE COURT: How long will the case take to try?

MR. ALLISON: Obviously –

THE COURT: You've got the week. I just want to know.

MR. ALLISON: I think it will still take most of the week. Probably all of it, since it's a short week.

THE COURT: What do you think?

MR. TERRY: Week.

THE COURT: Okay, whatever it takes. So, that's the way I see your case. I've given it a lot of thought, because we all want – we all want to see situations like this avoided, but I cannot see that there has been any constitutional violation, and that's a different than a negligent standard that I know you're used to dealing with. I just don't see it here. That's [p. 11] the way I call it. So, now, we have to – do you want to re-draft the pre-trial order given where we are? Or do you want to somehow amend where we are and somebody show me what the – show me the pre-trial order here and –

MR. TERRY: I would prefer an opportunity to confer with counsel before we address the pre-trial order. I do think it needs to be amended.

THE COURT: Do you want to come back at 1:00 o'clock?

MR. TERRY: Yes.

THE COURT: How about 1:30? Maybe you can settle the case. Is that why you asked? Those are nice things. Two o'clock. You're excused.

(Recess from 9:17 a.m. until 2:01 p.m.)

THE COURT: I'm advised that there is a settlement in the case and we do not need to pick a jury. Is that correct?

MR. TERRY: It is, Your Honor. The City of Corpus Christi and Steven Lowe have reached a settlement whereby the City of Corpus Christi will pay to Steven Lowe $125,000 plus costs of court incurred in the prosecution of this case against the City of Corpus Christi.

THE COURT: Is that correct?

MR. ALLISON: That is correct.

THE COURT: Very well. That resolves the matter. You're excused.

MR. TERRY: Thank you, Your Honor.

[p. 12] THE COURT: There are a whole lot more active or even a whole lot greater inaction with respect to what's here. And if you begin to read those cases, there's a particular case – the *Bryan County* case. Look at 674 – 67 F.3d 1174. That's about hiring – that's the kind of case –

(Proceedings concluded at 2:02 p.m.)

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Transcribed by: Jean Bartz

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above entitled matter.

/s/ Jean Bartz
Jean Bartz

May 6, 1996